United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1422

ORIGINAL

To be argued by
MURRAY RICHMAN

B

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL DI TURI,

Appellant,

and

FRANK CARUSO, ROBERT D'ADDARIO, MICHAEL DIRENZO a/k/a "The Fish", ANDREW DISIMONE, JOSEPH BUGLIARELLI a/k/a "Blue", LEO LARANDA, CARMINE GAGLIANO, JOSEPH MESSINA, DANIEL LATELLA and EMIL ANNATONE,

Defendants.

Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

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FRANK CARUSO, ROBERT D'ADDARIO, MICHAEL DIRENZO a/k/a "THE FISH", ANDREW DISIMONE, JOSEPH BUGLIARELLI a/k/a "BLUE", LEO FARANDA, CARMINE GAGLIANO, JOSEPH MESSINA, DANIEL LATELLA and EMIL ANNATONE,

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On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR THE APPELLANT

QUESTION PRESENTED

1. Whether the Court erred in its ruling that the failure to seal the State wiretaps immediately upon the expiration of the orders did not require suppression of the evidence obtained as a result of the wiretapping?

STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York (the Honorable Milton Pollack, Presiding) rendered on July 1, 1976, wherein the Court denied defendant's motion to suppress certain wiretap evidence holding that the provisions of Title 18, United States Code, §2518(8)(a) and New York State Criminal Procedure Law §700.50(2) were complied with by the Government. This brief is being submitted in conjunction with the brief and appendix in United States of America v. Frank Caruso, et al.

STATEMENT OF FACTS

A two-count indictment was filed charging appellant, Michael DiTuri, and ten other individuals with conspiracy in violation of Title 18, United States Code, Section 371 and a gambling offense in violation of Title 18, United States Code, Sections 1955 and 2.

The indictment alleged that from in or about January, 1974 through the filing of the indictment, defendants conspired to conduct and did conduct an illegal gambling business. Defendants having been informed that the Government's case relied, to a great extent, upon evidence obtained pursuant

to wiretapping activity, they moved to suppress such evidence asserting, inter alia, that the provisions of Title 18, United States Code, §2518(8)(a) and New York State Criminal Procedure Law §700.50(a) were not complied with.

On June 22, 1976, a hearing was held before Hon. Milton Pollack to determine said motions.

THE HEARING

By stipulation it was agreed that two (the Social Club and the G & D taps) of the eight New York state taps were not returned to the issuing Court and sealed until 24 and 42 days after their termination, respectively (pp. 8, 10, 26 and 27).* Said two tapes were the original tapes the evidence from which served as the predicate for the issuance of the other tapes, (see supporting affidavits for the issuance of the other six tapes). Appellant was overheard on the Social Club and G & D tapes, and thus has standing to contest the Government's late sealing (p. 10).

John J. Breslin, testified that during the period encompassed by the wiretaps in this case, he was Bureau Chief of the Rackets Bureau in the Bronx County District Attorney's Office and exercised general supervision over the investigation

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* Unless indicated otherwise, references are to the transcript of hearing on June 22, 1976.

(pp. 51-52). Regarding the Social Club tap, the District Attorney's Office did not receive the original tapes until January 29, 1974, 21 days after the termination (pp. 26 and 53). During that three (3) week period the tapes were in the process of being duplicated by the New York City Police Department (p. 53). Regarding the G & D tap, during the six (6) week period from termination to sealing, the Police Department and the Chief Assistant District Attorney, Mr. Rotker, conducted an investigation into a possible "leak" of the existence of the tap; an ugly climate existed between the Bronx District Attorney's Office and the New York City Police Department; the Assistant District Attorney in charge of the G & D investigation, Mr. Carroll, engaged in no activity regarding the tap nor did he continue on the investigation in any capacity; during the middle of February, Mr. Carroll was given an unrelated matter to take to trial; on approximately February 24, 1974, Mr. Carroll was admitted to the hospital for a cause unrelated to the investigation; toward the middle of March, 1974, another Assistant District Attorney, Mr. Lipman, was assigned to the matter; and the tapes were returned by Mr. Lipman and sealed (pp. 56-62). There was no tactical reason for the delay in the sealing of the two tapes, the sealing provisions of the New York State statute were not

complied with but were not deliberately ignored, no investigative benefit was obtained as the result of the delay, and Mr. Carroll was a young man with his initial experiences in the District Attorney's Office in connection with this kind of investigation (pp. 59, 60 and 63). On cross-examination, Mr. Breslin stated that the investigation into the leak regarding the G & D tape did not prohibit the tapes from being sealed and that the failure to seal the tapes was the result of forgetfulness and negligence (pp. 71-72). Neither of the issuing Justices were informed of the failure to make prompt sealing (pp. 74-75). Mr. Breslin could not state whether any tampering with the tapes had occurred prior to their receipt by the District Attorney's Office (p. 80).

Jules Bonavolonta testified that he was a Special Agent of the Federal Bureau of Investigation. His testimony had reference to the wiretaps obtained through the auspices of the federal authorities.

ARGUMENT

POINT I

THE COURT ERRED IN ITS RULING THAT THE FAILURE TO SEAL THE STATE WIRETAPS IMMEDIATELY UPON THE EXPIRATION OF THE ORDERS DID NOT REQUIRE SUPPRESSION OF THE EVIDENCE OBTAINED AS A RESULT OF THE WIRETAPPING.

The appropriate authorities in New York State, to wit, the Bronx District Attorney's Office and the New York City Police Department, failed to comply with the statutory requirement of prompt sealing. The relevant statute, New York's Criminal Procedure Law, §700.50(2) requires that the wiretaps herein have been made available to the issuing Justice and sealed "immediately upon the expiration of the period" of the warrants. There is no question but that the delays of 24 and 42 days respectively preclude the conclusion that sealing was immediate for either tap. Therefore, only if a "satisfactory explanation" for such delay exists should disclosure of the tapes be allowed (New York State Criminal Procedure Law §700.65(3)). It is respectfully submitted that the explanation profferred is not satisfactory.

Mr. Beslin's explanation for the two delays was that (a) the 24-day delay on the Social Club tap included a three (3) week period during which the tapes were in the process of

being duplicated by the Police Departm
delay on the G & D tap was the result,
climate between the prosecutor's offic
forgetfulness and negligence within th
Office.

Regarding the Social Club tap, no
as to why the original tapes were not
they were duplicated instead of waiti
had been copied. Given the legislati
for immediate sealing and the absence
the explanation offered for the 21-da
District Attorney's receipt of the ta
(cf. United States v. Gigante, 538 F.
People v. Sher, 38 N.Y.2d 600; People

The explanation offered for the
G & D tap is even more unacceptable.
for the failure to seal the tapes oth
between the law enforcement agencies.
admission, the District Attorney was
sealing the tapes and such omission w
forgetfulness and negligence. No com
excuse exists for the inordinate dela
of these tapes.

United States v. Poeta, 455 F.2d 117 (2d Cir. 1976) is inopposite since the satisfactory explanation offered therein was the police impression that the return had to be made to the same Justice who had issued the warrant, a reliance upon the wording of the statute. In the instant case, the delays were occasioned by an insistence upon a single return after all tapes had been duplicated on the one hand and inter-agency warfare on the other.

The two wiretaps having failed to be properly and lawfully sealed and there being no proof of an absence of tampering as to either tap, their suppression should have been granted. Since the supporting affidavits for the issuance of all subsequent taps was obtained as the result of the conversation overheard on the instant two taps, all subsequent taps are necessarily tainted and must be suppressed also.

POINT II

PURSUANT TO RULE 28 (i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT DITURI HEREBY ADOPTS THE POINTS AND ARGUMENTS OF THE OTHER APPELLANTS INSOFAR AS THEY MAY HAVE APPLICATION TO THE APPELLANT DITURI.

CONCLUSION

For the above-stated reasons, the order below should be reversed and the evidence obtained from the wiretaps should be suppressed.

Respectfully submitted,

Murray Richman, Esq.
Attorney for Appellant

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

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and
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Defendants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 23 *day of* December 1976 *at* 1 St. Andeews Plaza New York, N.Y. 10007

deponent served the annexed Brief *upon* U.S. Attorne, Robert Fiske Jr.

the attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 23rd *day of* December 19 76

Beth A Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

Reuben Shearer